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ABSTRACT

This paper is a presentation, in outline form, of the development of the "quasi-nonpublic forum," where cases involving student free speech push the envelope of what is acceptable under Constitutional law and what is appropriate/acceptable student behavior under constraints set by school regulations. Context is set by presenting court decisions regarding students' constitutional rights, such as "Tinker versus Des Moines Independent Community School District" (students wearing black armbands to protest the Vietnam War) and "Hazelwood School District versus Kulhmeier," in which school administration excised material from the school-sponsored newspaper. Later cases tell of the erosion of the Tinker/Fraser/Kulhmeier Standard, students' constitutional rights not being co-extensive with those of adults, and the drawing of the line involving religious proselytizing on school grounds during school session hours. The cases presented demonstrate a convergence of three trends in contemporary constitutional jurisprudence: the neutrality principle in Establishment Clause jurisprudence; the eliding of Establishment Clause and Free Speech analyses, especially when Free Speech is combined with Free Exercise Clause arguments; and the diminution of students' Constitutional rights generally. Questions remain, for example: Is the government dictating the content of people's prayers when courts command that religious speech not be proselytizing? (RT)

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The Emergence of a Fourth Type of Public Forum: Is the Quasi-Nonpublic Forum a New Paradigm for Student Free Speech Cases?

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THE EMERGENCE OF A FOURTH TYPE OF PUBLIC FORUM:
IS THE QUASI-NONPUBLIC FORUM A NEW PARADIGM FOR STUDENT FREE SPEECH CASES?

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I. Paradigmatic Statements Regarding Students' Constitutional Rights

A. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] Indeed, Justice Brennan, concurring in *Fraser* described this proposition as "unimpeachable."[2]

B. "[The] constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[3]

II. Foundation Student Speech Cases

A. *Tinker v. Des Moines Independent Community School District*--Suspension of students for wearing black armbands to protest Vietnam War violated the First Amendment.[4]

B. *Bethel School District No. 403 v. Fraser*--Suspension of student for vulgar and lewd speech did not violate student's free speech rights.[5]

C. *Hazelwood School District v. Kulhmeier*--Excision of controversial material from school sponsored newspaper did not violate the First Amendment.[6]

D. The *Tinker/Fraser/Kulhmeier* Standard: School officials could ban or punish speech if

1. They could reasonably forecast a material disruption of the school or school activities, or
2. Speech was vulgar or lewd, or
3. Speech carried the imprimatur of the school.

III. Erosion of the *Tinker/Fraser/Kulhmeier* Standard

E. *Chandler v. McMinnville School District*[7]

1. Facts

a. The teachers at McMinnville, Oregon commenced a lawful strike in February 1990. The school district hired replacement teachers. Two students at McMinnville High School, whose fathers were among the strikers, arrived at school with buttons and stickers on their clothing which read "I'm not listening scab" and "Do scabs bleed." They distributed similar buttons to their classmates.

b. When the principal became aware of the buttons, he asked the two students to remove the buttons because they were disruptive. Both the students and teachers stated that the buttons had not disrupted the educational atmosphere during morning classes, but the principal continued to insist that the buttons be removed. The students removed and were suspended for the remainder of the day.

c. The next day the students returned with similar buttons and stickers. This time, when one of the two students was asked to remove the buttons containing the

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word "scab" he did so out of fear of further disciplinary actions. The students then filed suit in district court alleging that the school officials' reasons for requesting the removal of the buttons were false and pre-textual, and therefore violated their First Amendment rights of freedom of expression.[8]

2. Holding--Under *Tinker* the "scab" buttons were not inherently disruptive, thus the dismissal by the lower court is reversed and the case is remanded for a finding of fact.
3. Rationale
   a. Student speech can be regulated if lewd, vulgar, obscene, or offensive under *Bethel*, school-sponsored speech can be regulated under *Kulhmeier*, and all other speech by the "material and substantial disruption" test found in *Tinker*.
   b. Mere use of the word "scab" was not inherently disruptive thus the school district could not suppress such speech absent the showing of a substantial disruption to school activities.

F. *Hedges v. Wauconda Community Unit School District No. 118*[9]
   1. Facts
      a. The principal of an Illinois school district confiscated religious tracts from an eighth grade student, Megan Hedges, who was distributing them outside her junior high school. At the time (1990), district policy prohibited elementary and junior high school students from distributing "written material. . . of a religious nature."[10]
      b. After a district court decision striking down the policy the district instituted a policy allowing students to distribute up to 10 copies of written materials before and after school at a table near the front entrance to the school building and prohibiting, inter alia, the distribution of religious material that students might construe as school sponsored and students from distributing materials that are "primarily prepared by non-students or which concern the activities, or meetings of non-school-sponsored organizations."[11]
      c. The principal forbade Megan from handing out more than 10 copies of her tract or a flyer inviting students to an activity at her church, but permitted her to distribute a position paper.
   2. Holdings
      a. Unconstitutional
         (1) Original policy prohibiting distribution of religious materials
         (2) Revised policy's prohibiting the distribution of religious material that school believed students might reasonably conclude to be school-sponsored or endorsed.
      b. Constitutional
         (1) Time, place and manner restrictions
         (2) Revised policy's prohibiting the distribution of materials was prepared by third parties
   3. Rationale
      a. Establishment Clause analysis

(1) Although the *Hedges* court notes that the justices are not of one mind regarding Establishment Clause analysis, it only uses coercion analysis, which it disposes of very quickly, and the endorsement test.

(2) No endorsement in permitting political or religious speech.

(a) What an institution permits is not necessarily attributed to it.

(b) School discharges its duty of religious neutrality under the endorsement test when it and its agents refrain from engaging in religious speech.

(3) Dismisses the district's argument that *Widmar* and *Lambs' Chapel* and *Mergens* are inapposite because they concern colleges and high schools, respectively.[12]

(4) Mixes in free speech analysis and charges the school with educating its students in the nuances of non-endorsement under the Establishment Clause.

b. Forum analysis

(1) Cites *Lamb's Chapel* for the proposition that a school is a nonpublic forum which, while it is not required to open its doors to nonpublic speakers, may not engage in content or viewpoint discrimination or adopt "unjustified [unreasonable] regulations."[13]

(2) Cited Kennedy's concurrence in *International Society for Krishna Consciousness, Inc. v. Lee*. "Whether the increasing complexity of public-forum doctrine has more to offer may be doubted."[14]

(3) Schools can refuse to open themselves to expressive use by non-students, and students themselves are highly regimented by school officials.

(4) Distinguished between permissible suppression of incivility, i.e., speech that undercuts the school's mission of inculcating students in the habits of civility (*Fraser*) and the impermissible suppression of similar speech by authorities outside the school environment (*Cohen*).[15]

G. *Muller by Muller v. Jefferson Lighthouse School*[16]

1. Facts

a. Fourth grade student requested permission to distribute invitations to religious meeting to be held at his church.

b. Not clear whether student intended to distribute during class or non-instructional periods

c. When principal refused based on religious nature of materials, he received call from Liberty Counsel.

d. According to principal, he told family that distribution of materials was limited to those related to school projects and programs, but gave permission for student distribute to specific friends. Principal stated that even if student distributed materials he might not be caught or if caught he would only be admonished that he should have gotten permission.

e. Family alleged that principal refused on the grounds that if he granted permission for distribution he would have to grant permission for other churches to distribute materials.

f. Principal claimed that permitting the distribution of non-school materials required permission from central office.
g. District policy required principal's permission before distribution of non-school-sponsored materials. She or he could refuse if materials were libelous, contained obscene language, incited illegal actions, insulted groups or individuals, or threatened based on a reasonable forecast to greatly disrupt or materially interfere with school operations and intrude into school affairs or intrude into the lives of others. Principal and student were to agree on time and place for distribution.

2. Holdings
   a. Public elementary school was nonpublic forum.
   b. Upheld district policy for distribution of non-school-sponsored materials
      (1) Prior approval
         (a) Reasonable
         (b) Procedural safeguards were adequate
         (c) Did not implicate Establishment Clause
         (d) Screening for offensive messages was not improper content restriction
      (2) Time and place restriction valid
      (3) Disclaimer, i.e., statement of non-endorsement by district permissible
3. Rationale
   a. Students' constitutional rights not co-extensive with those of adults
   b. Traditional approach to education (*Acton*), "nurturing authority" whose purpose is to inculcate values outweighs student's free speech rights because emphasis is preparing students for citizenship rather than permitting the present expression of the rights of citizenship. Includes "custodial and tutelary" language from *Acton*.
   c. Court gives cursory nod to school as expressive forum/students as autonomous individuals/marketplace of ideas.[17]
   d. Discusses in loco parentis doctrine and its abrogation by *Tinker*[18]
   e. Discusses *Fraser* and makes special point of noting that age is a particular factor, i.e., the effect of offensive speech on 14 year-olds at issue in *Fraser*[19]
   f. Cites *Kulhmeier* for the following propositions
      (1) "'A school need not tolerate student speech that is inconsistent with its basic educational mission.'"[20]
      (2) A limited public forum in public schools requires an intent on the part of school authorities to open school facilities to "'indiscriminate use by the general public or some segment of the public such as student organizations.'"[21]
   g. The proper test for nonpublic fora is rational basis, i.e., "'reasonably related to legitimate pedagogical concerns.'"[22]
   h. Emphasized the distinction between elementary and high schools
      (1) "[F]ourth-graders [do not] have the free expression rights of high school students."[23]

(2) If high schools can suppress speech to protect students, for example, *Fraser* (protecting 14-year-olds from sexual innuendo) and *Kulhmeier*, then elementary schools can protect "five through thirteen-year-olds from topics and viewpoints that could harm their emotional, moral, social, and intellectual development."[24]

(3) Marketplace of ideas significantly less important in elementary schools than in high schools

i. Seventh Circuit declined to overrule its *Hedges* decision to declare elementary schools are limited or designated public fora.

(1) District policies/restrictions indicate that district did not intend schools to be public fora.

(2) The "'verbal cacophony'"of public forum could overwhelm elementary school's "delicate 'custodial and tutelary' environment."[25]

j. Inculcation of civility

(1) A primary responsibility of public education

(2) Includes power to suppress speech that might "crush a child's sense of self-worth."[26]

(3) Beyond noting that the elementary school is not the place for Christians to tell Jews they are damned or Jews to tell Christians they are not part of God's chosen people, as is permissible in a public forum, the court does not explore how invitation to church function might "crush a child's sense of self-worth."[27]

(4) Schools may act to protect students because they are a captive audience (upholding school's prior restraint policies).[28]

(5) Schools can engage in content restrictions and if the speech is "fundamentally 'inconsistent with its basic educational mission,'" or otherwise inconsistent with its legitimate pedagogical concerns."[29]

(6) Here, school officials did not act improperly because student speech at issue could be considered "insult[ing] to [a] group or individuals and [an] intru[sion] into. . . the lives of others" as specified in district's policy.[30]

4. Comment--Note that the *Chandler* court reaches contrary result from that of the *Muller* court regarding student religious speech, i.e., in *Chandler v. Seigelman* the Eleventh Circuit, held that school administrators could not suppress student religious speech although it discussed *Muller* with great approval, arguing that school officials could suppress the secular speech of a secondary school student in *Denno v. School Board of Volusia County*.[31] Note, too, that the Eleventh Circuit decided *Denno* just three months before it decided *Chandler*.

H. *West v. Derby Unified School District # 260*[32]

1. Facts

a. Kansas school district has experienced a number of racial incidents, including but not limited to, the harassment of students, especially at the middle school and spray-painted KKK graffiti, and an attempt by members of the Aryan Nation to recruit new members at the high school.[33] In response the district adopted a racial harassment policy as recommended by its 350 member Racial and Social Equity

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Task Force which provided, inter alia, Students shall not have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred." The policy gave several examples, including Confederate insignia.[34] After the policy was adopted by the board, the number of racial incidents declined substantially.[35]

b. T.J., a seventh grade student who had already been admonished twice for making racially derogatory remarks, drew a copy of the Confederate flag on a piece of paper in his mathematics class and displayed it to three of his classmates although he did not use it to harass or intimidate any students.[36] After a student took the drawing to T.J.'s teacher, the assistant principal suspended him for three days under the board's racial harassment policy.[37]

2. Holdings
   a. District did not violate student's Fourteenth Amendment due process or equal protection rights.
   b. Suspension did not violate student's First Amendment free speech rights.
   c. District's policy was neither unconstitutionally overbroad nor void for vagueness.
3. Rationale
   a. Free Speech
      (1) Cited *Tinker*
         (a) Public school students' free speech rights are not coextensive with those of adults.
         (b) Schools may suppress speech 'that might "substantially interfere with the work of the school or impinge upon the rights of other students."'[38]
      (2) Here, school officials did not have an "undifferentiated fear or apprehension" of disturbance but did have substantial past evidence to forecast disruption.[39]
      (3) The Tenth Circuit explicitly adopted the district court's First Amendment analysis.
         (a) Cited *Fraser* for the proposition that public school students do not have the same latitude regarding free speech rights as is afforded adults.[40]
         (b) Student's "speech"/rendition of Confederate flag unrelated to academics, i.e., educational mission of school.[41]
         (c) Court saw fit to include a discussion of the divisive nature of the Confederate flag.
         (d) Although the court did not need to reach the inculcation of civility "doctrine" under *Fraser*, it noted that "[p]art of a public school's essential mission must be to teach students of differing races, creeds and colors to engage each other in civil terms" and the district was within its "lawful authority" to "insis[t] upon more civil terms of debate."[42]
   b. Overbreadth

(1) Policy as applied was not overbroad because district had not disciplined any student depictions of Confederate in materials with legitimate pedagogical purpose.[43]

(2) Again, the circuit court explicitly incorporated the reasoning of the court below when it found in considering whether the district engaged in improper content discrimination. District' policy as written or applied was not improper content discrimination by distinguishing between permissible, e.g., illustrations in history books, displays of state flags, and impermissible display of Confederate flag. Differentiating between these renditions of the symbol was a "narrowing construction" consistent with *Tinker* exception for potentially disrupting speech.[44]

c. Comments–Does "civil" include religious proselytizing with its implications of religious inferiority? In the eyes of many, the Confederate flag at issue in *Denno*, especially the Naval Jack or battle flag, connotes racial inferiority.

I. *Denno v. School Board of Volusia County*[45]

1. Facts--Florida school district suspended high school student, Wayne Denno for displaying Confederate flag. Wayne, who participated in Civil War reenactments and living histories as part of his deep interest in Civil War history, showed a four inch square Confederate flag to a small group to friends during a lunch break at school. Wayne was explaining his participation in various activities connected with his interest in Civil War history. When assistant principal Roberts saw Wayne showing the flag to his friends, he suspended him for nine days.
2. Holding –Administrators were entitled to qualified immunity because their conduct did not violate a clearly established right of which a reasonable school administrator would have known (subjective standard).
3. Rationale
   a. Qualified immunity
      (1) Because administrators were not final policymakers, the court would not impute liability to the board liability for their conduct.
      (2) In addition, imputing liability to the board would require a pattern or practice of the complained of behavior, and in *Denno* there was no pattern or practice of banning Confederate symbols.
   b. Student free speech rights
      (1) Heavy reliance on *Fraser*
      (2) Students' constitutional rights not coextensive with those of adults.[46]
      (3) "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers--and indeed the older students--demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.'"[47]
      (4) *West v. Derby Unified School District*[48]
         (a) One interesting aspect of the Eleventh Circuit's discussion of *West* is its emphasis on the district court rather than the Tenth Circuit's

opinion and notes that the Tenth Circuit adopted the reasoning of the district court's first holding, i.e., that under *Tinker* the restriction was permissible because in light of past events at the school, "'a student's display of the Confederate flag might cause disruption. . . .'"[49]

(b) Potential offensiveness equals a reasonable forecast of disruption

(c) Students free speech rights versus the school's countervailing interest in teaching civilty/boundaries of socially appropriate behavior

(d) Adopts what the *Denno* court calls a "flexible reasonableness standard" from *Muller*[50]

(e) Are restrictions reasonably related to legitimate pedagogical concerns?

(f) School is not public forum vis à vis students personal communications to each other.

(g) "Custodial and tutelary" function of *Acton* combined with *Fraser* permits parent-like guidance inappropriate for [true] public forum[51]

(h) *Tinker* plus flexible reasonableness standard that includes teaching civility

c. Comments

(1) What makes *Denno* particularly interesting (an issue that was not addressed by court) is the fact that Confederate symbol or battle flag is part of Georgia's state flag.

(2) Another interesting aspect of *Denno* is that arguably the student was engaged in a serious discussion of an avocation that has real implications for learning, i.e., nonacademic, nonschool learning.

J. *Cole v. Oroville Union High School District*[52]

1. Facts

a. Oroville High School has historically included in the graduation ceremony a spiritual invocation delivered by a student chosen by a vote of his or her classmates. Under a district policy instituted sometime around 1985, all student speeches and invocations for graduation are reviewed by the principal, who has the final say regarding their content.[53]

b. Cole and Niemeyer were chosen to give the invocation but were very late in turning in their speeches for administrative approval. Niemeyer state he did not submit his speech to his faculty advisors for review of the speech's content "because I know they don't hold the same convictions that I do as far as faith."[54] When the speeches were finally submitted the principal told them to tone down the proselytizing and sectarian religious references; make them more nondenominational. The students refused and speeches were rejected.[55]

2. Holding

a. "District officials did not violate the students' freedom of speech. Even assuming the Oroville graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause. . . ."[56]

3. Rationale
   a. The invocation was not private speech, because the district authorized it, the graduation ceremony was held on school grounds, only a student selected through a voting procedure dictated by the district was allowed to use the public address system to give the invocation.
   b. Likewise, the valedictory speech fell under the plenary control over the graduation ceremony and would have borne the imprint of the district. The district authorized the valedictory speech as part of the district-administered graduation ceremony, held on district property and financed in part by tax dollars in which only selected students are allowed to speak.
   c. Moreover, the district retains final supervisory control over the content of the speech.

K. *Saxe v. State College Area School District*[57]
   1. Facts
      a. In August 1999, the State College Area School District (SCASD) adopted an Anti-Harassment Policy which set for the district's goal of "providing all students with a safe, secure, and nurturing school environment."[58] In order to obtain that goal, the SCASD policy forbid harassment which it had defined as follows:

> "Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."[59]

      b. This definition was followed by a series of examples of what would be considered harassment as well as additional definitions of various types of harassment. Punishment for anyone found guilty of harassment included counseling, suspension and expulsion.
      c. Plaintiff David Saxe was a member of the Pennsylvania State Board of Education, an unpaid volunteer for the SCASD, and a parent of students enrolled in the SCASD. In his complaint he alleged that the SCASD policy was unconstitutional under the First Amendment's free speech clause for vagueness and over-breadth. The basis for his claim was that the wording of the policy infringed upon the rights of his children to speak out about the sinful nature and harmful effects of homosexuality as taught by the children's religion. Moreover, because of the vague wording of the policy, it also posed a danger of chilling other free speech acts regarding the children speaking about their religious beliefs.
      d. The district court dismissed the plaintiffs' free speech claims based on its conclusion that "harassment," as defined by federal and state anti-discrimination statutes is not entitled to First Amendment protection. The court rejected the plaintiffs' characterization of the policy as a "hate speech code," holding instead that it merely prohibited harassment that was already unlawful under state and federal law.[60]

2. Holding--"We disagree with the District Court's reasoning. There is no categorical "harassment exception" to the First Amendment's free speech clause. Moreover, the SCASD Policy prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law."[61]
3. Rationale
   a. No harassment exception to protected speech
      (1) "There is of course no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. . . When laws against harassment attempt to regulate oral or written expression on such topics, however, detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications."[62]
      (2) "Harassing or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, 'if there is a bedrock principle underlying the first Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable. For this reason, we cannot accept SCASD's contention that the application of anti-harassment law to expressive speech can be justified as a regulation of the speech's 'secondary effects.'"[63]
      (3) "In short, we see little basis for the District Court's sweeping assertion that 'harassment"– at least when it consists of speech targeted solely on the basis of its expressive content–"has never been considered to be protected activity under the First Amendment." Such a categorical rule is without precedent in the decisions of the Supreme Court or this Court, and it belies the very real tension between anti-harassment laws, and the Constitution's guarantee of freedom of speech."[64]
   b. Policy's reach is too broad
      (1) "The policy prohibits harassment based on personal characteristics that are not protected under federal law. . . .The Policy, in contrast, is much broader, reaching, at the extreme, a catch-all category of "other personal characteristics."[65]
      (2) By prohibiting disparaging speech directed at a person's "values," the Policy strikes at the heart of moral and political discourse – the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about "values" may offend is not cause for its prohibition, but rather the reason for its protection" "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' No court or legislature has ever suggested that

unwelcome speech directed at another's 'values' may be prohibited under the rubric of anti-discrimination."[66]

(3) "Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Kulhmeier*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to Tinker's general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others."[67]

(4) "The policy, even narrowly read, prohibits a substantial amount of non-vulgar, non-sponsored student speech. SCASD must therefore satisfy the *Tinker* test by showing that the policy's restrictions are necessary to prevent substantial disruption or interference with the work of the school or the rights of other student. Applying this test, we conclude that the policy is substantially overbroad. . . .Although the SCASD correctly asserts that it has a compelling interest in promoting an educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the policy. The policy, then, appears to cover substantially more speech than could be prohibited under *Tinker's* substantial disruption test. Accordingly, we hold that the policy is unconstitutionally overbroad."[68]

L. *Castorina v Madison County School Board*[69]

1. Facts

a. Plaintiffs were students at Madison Central High School, Madison County, Kentucky. On September 17 the two plaintiffs, Timothy and Tiffany, came to school wearing matching Hank Williams, Jr. concert T-shirts which had been given to them by Tiffany's father. On the front of the shirts was a picture of Hank Williams, Jr. On the back were two confederate flags and the phrase "Southern Thunder." Timothy and Tiffany stated that they were wearing the shirts to commemorate Hank Williams, Jr.'s birthday and to express their southern heritage. When the principal saw the shirts he informed Timothy and Tiffany, neither of whom had experience prior disciplinary problems, that the confederate flag emblem violated the school's dress code. He based this statement on his interpretation of the dress code which "prohibits students from wearing any clothing or emblem that is obscene, sexually suggestive, disrespectful, or which contains slogans, words or in any way depicts alcohol, drugs, tobacco or any illegal, immoral, or racist implication."[70]

b. The principal gave them the option of either turning the shirts inside out or returning home to change. They refused so their parents were called. He informed the parents that if they could convince the kids to go home and change their shirts there would be no disciplinary action; if not Timothy and Tiffany would be suspended for three days. The parents support the decision of their children and Timothy and Tiffany were suspended.

c. At the end of the three days, the two students returned wearing the same shirts and were suspended for another three days. They never returned to Madison Central and were home-schooled by their parents
d. The district court found that wearing the T-shirts did not qualify as "speech" and that even if it were "speech," the plaintiffs failed to show a First Amendment violation. In addition, the court rejected the plaintiffs' contention that the school dress code was vague and

2. Holding
   a. The wearing of a confederate flag T-shirt qualifies as the type of speech covered by the First Amendment.
   b. The issue as to enforcement of the dress code policy needs to be heard by the district court.
3. Rationale
   a. Symbolic Speech
      (1) The test laid out by the Supreme Court was whether an intent to convey a particularized message was present and whether the likelihood was great that the message would be understood by those who viewed it.[71]
      (2) "We conclude that the plaintiffs intended to express more than a mere appreciation for the life and music of either performer. Further, their decision to return to school at the end of the first suspension still wearing the T-shirts demonstrates that the students fully appreciated the message that school administrators understood the T-shirts to convey. Because the plaintiffs' intended expression was both a commemoration of Hank Williams, Sr.'s birthday as well as a statement affirming the plaintiffs' shared southern heritage, their decision to wear Hank Williams T-shirts constitutes speech falling within the First Amendment.
   b. School board's authority to regulate student speech
      (1) This case is governed by *Tinker v. Des Moines Independent Community School District*, *Hazelwood School District v. Kulhmeier*, and *Bethel School District No. 403 v. Fraser*.
      (2) "Viewing the facts in the light most favorable to the students, the school has banned only certain racial viewpoints without any showing of disruption. As a result, without any formal factual findings to guide us, we see no obvious differences between the *Tinker* and Madison County situations other than the fact that the Des Moines School Board adopted a formal policy banning black armbands before the students ever wore them, whereas the Madison County School Board banned Confederate flags in a more "ad hoc" manner. This means that in *Tinker* there was a formally targeted ban from the very beginning, whereas the Madison County dress code is a facially neutral policy that is enforced, according to the students, in a content0 specific manner. If the students' claim is true, only certain ideological positions are barred from expression on school property. Based on the Supreme Court rulings in *Tinker*, *Mosley*, and *Rosenberger*, the school board cannot single out Confederate flags for special treatment while allowing other controversial racial and political symbols to be displayed."[72]

IV. Blending Religion Clause and Free Speech Analysis: *Chandler v. Seigelman*

A. *Chandler v. James*[73]

1. Facts–
   a. In 1996, an assistant principal in the DeKalb County (Alabama) public schools, Michael Chandler, filed suit alleging that the state's school prayer statute violated the Establishment Clause.
   b. This was the fourth moment of silent reflection statute passed by the Alabama legislature. Two previous statutes had been struck down in *Jaffee v. Wallace*.[74] The statute provided that "'[o]n public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school- related student assemblies, school-related student sporting events, school- related graduation or commencement ceremonies, and other school-related student events.'"[75]
2. Holding–Alabama's school prayer statute was unconstitutional under the Establishment Clause because it violated all three prongs of the *Lemon* test.

B. *Chandler v. James*[76]

1. Facts--School officials and teachers in the Dekalb County (Alabama) public schools engaged in a wide variety of religious activities with students.
2. Permanent injunction issued
   a. Implementation of school prayer statute
   b. Administrators, staff, and faculty enjoined from
      (1) "Aiding, abetting, commanding, counseling, inducing, ordering, procuring, or permitting *school organized or officially sanctioned* religious activity in the classrooms of DeKalb County schools [or at school assemblies or school-sponsored events, whether voluntary or compulsory] *including, but not limited to:* vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students."[77]
      (2) Participating in or encouraging graduation benedictions or invocations or listing religious activities or messages on commencement programs
      (3) Encouraging or permitting students, school employees, nonschool persons (including clergy) to use the school's public address system for prayer, scriptural readings, or the delivery of religious or devotional messages
      (4) Encouraging or permitting the distribution of religious literature, e.g., Gideon Bibles or religious tracts by school employees or non-school persons on school property or at school functions (although such materials could be placed in a common area if the district had a written policy)
3. Writ of mandamus ordering district to
   a. Promulgate a written policy regarding distribution of religious materials by outsiders
   b. Immediately provide a copy of injunction to Gideon's International
   c. Inform Gideon's International that
      (1) Students were not to be harassed regarding their acceptance or non-acceptance of Gideon Bibles.
      (2) Act in an aggressive manner toward students while they were on school property, including but not limited to, "throw[ing] or pass[ing] Bibles through the windows or doors of. . . school buses. . . ."[78]

d. Conduct mandatory staff development regarding the Religion clauses of the First Amendment
e. Submit names of three individuals to serve as monitors to ensure compliance with the court's order. Judge De Ment also specified the authority and powers of the monitor

4. Injunction did not apply to
   a. Academic and objective use of religious materials in the classroom
   b. Students' expression of their religious beliefs in school work
   c. If school allows "non-religious expressive symbols and apparel," then clothing and display of religious symbols is also permitted.[79]
   d. The religious activity of secondary school students during noninstructional time if consistent with Equal Access Act or "to quietly engage in religious activity during noninstructional times, *so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves*". . . or to distribute religious material to their fellow students under the same limitations as secular material."[80]
   e. Brief religious statements during commencement exercises or student addresses
   f. The use of the public address system to announce information messages regarding the meetings and activities of noncurricular religious clubs

C. *Chandler v. James*[81] This proceeding concerned two motions. Both of which were denied.
   1. A motion brought in state court to enjoin the implementation of Judge De Ment's previous orders which was denied as moot, in part because the state court motion was voluntarily dismissed by the plaintiffs, i.e., state of Alabama.
   2. Motion to amend the court's October 1997 injunction
      a. The court found that unconstitutional religious activities by school employees were pervasive.
      b. School officials were likely to continue such activities given their previous propensity to disregard the decisions of federal courts concerning religious activities in public schools.
      c. Indeed, the court noted that its March 1997 order had not been observed since it was entered.
      d. The opinion of the court contains substantial evidence of continuing violations of Judge De Ment's orders. Several of which were addressed in a second opinion issued the same day.

D. *Chandler v. James*[82] The court held that the following activities were unconstitutional
   1. Pre-game student or clergy led prayers at football games
   2. Student led devotionals, including prayer, even "'nonreligious' devotionals ['words of inspiration'] that ended with a prayer" at school-sponsored events or delivered over the intercom system[83]
   3. Student-led classroom devotionals and prayer, especially when teachers ask for or select students to give the prayer or devotional and/or teachers read aloud from the Bible without an academic purpose
   4. Nonstudent distribution of Bibles and other religious materials during the school day and in the classrooms and presentations made by non-school persons in association with such distributions

E. *Chandler v. James*[84]
   1. Denied state's request for stay of permanent injunction
   2. Injunction was neither overbroad nor vague.

3. Provision of injunction permitting students to "quietly engage in religious activities during noninstructional time so long as it does not unduly call attention thereto" was not sufficiently narrowly tailored.
    a. Court pointed out these were twelve words out of a three-thousand, seven-hundred and fourteen word injunction.[85]
    b. Court noted that this language merely clarified that students permitted to engage in religious activities when such activities were "not officially sanctioned or coerced and [did] not infringe on the rights of others" consistent with *Tinker's* time, place and manner restrictions."[86]
    c. However, the court warned that "inconsistent enforcement of school rules that work to favor religious conduct over other types of conduct may be construed as state promotion or indorsement of religion or a particular religion over other religions or non-religion."[87]

F. *Chander v. James*[88]
1. Holdings
    a. Free speech and "freedom of expression" Clauses of the First Amendment require school district to "permit[ting] genuinely student-initiated religious speech in schools and at school-related events"did not violate the Establishment Clause.[89]
    b. Students' religious speech could not be supervised or prohibited by state but was subject to time, place, and manner restrictions
2. Reasoning/finding
    a. Establishment Clause violated only when government requires or compels religious speech
    b. The Constitution "affirmatively mandates accommodation [and] probably does not require a 'wall' [of separation] at all."[90]
    c. Blends Free Speech and Religion Clause, especially Free Exercise, jurisprudence together
        (1) Beyond a brief acknowledgment that public schools are nonpublic fora the court engages in only a few lines of forum analysis in an opinion that rests heavily on the Free Speech Clause as a justification for forbidding school authorities from interfering in students' religious speech.[91]
        (2) The Free Exercise and Free Speech Clauses require that school officials permit student religious speech at the same time, and in the same place and manner as secular speech."[92]
    d. Suppression of student religious speech in the injunction evinced hostility toward religion
    e. From Equal Access Act
        (1) State may not participate in nor supervise the speech
        (2) State may make reasonable time, place and manner restrictions
        (3) Proselytizing not permitted.
    f. "'Cleansing' our public schools of all religious expression, however, inevitably results in the "establishment" of disbelief--atheism--as the State's religion."[93]
3. Comments–
    a. Questions
        (1) Is religion speech cleansed from our public schools when group prayer is prohibited?
        (2) Is atheism a religion (or just nonreligion, i.e. that which is not religious). What about agnosticism?

(3) Is that which is nonreligious ipso facto a religion/anti-religion.
(4) It is disingenuous for the court to
(a) Cast the injunction as prohibiting all student-initiated religious speech as it does constantly throughout its *Chandler* opinion, especially in the light of the substantial and increasing control that school officials exert over students' secular speech.
(b) State that the government is required to "'tolerate' atheistic views" and therefore, a student may chose to express his [or her] atheistic views. . . .[94]
(c) Forbid the school from supervising students' religious while at the same time granting it the right to impose reasonable time, place, and manner restrictions. How would the school impose such restrictions unless it could supervise the speech? Don't schools supervise students' secular speech?

G. *Chandler v. Siegelman*.[95] Supreme Court vacated and remanded *Chander v. James*, 180 F.3d 1254 (11th Cir. 1999) in light of its holding in *Doe v. Santa Fe Independent School District* (district policy of permitting student-led and initiated prayers as determined by results of two-part election process at school-sponsored athletic events violated the Establishment Clause).[96]

H. *Chandler v. Siegelman*[97]

1. Holdings
a. Voluntary, student-initiated prayer is permissible notwithstanding Supreme Court's *Santa Fe* decision.
b. School personnel cannot apply any time, place, or manner restrictions on religious speech that they do not also place on nonreligious speech

2. Findings
a. Distinguishes *Santa Fe*[98]
b. Public address system (it is questionable whether the Supreme Court's decision in *Santa Fe* turned on the use of the school's public address system)
(1) Emphasis on Supreme Court's focus on the word "invocations"
(2) Under *Santa Fe* some religious speech is private
c. "The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets."[99]

3. Comments--This is very thin reasoning that basically says
a. This is fact pattern that is sufficiently different from *Santa Fe* (lack of entanglement, no use of public address system)
b. Here is our reasoning in *Chandler v. James*.
c. Therefore, we reaffirm.
d. Note that the *Chandler* court reaches contrary result from that of the *Muller* court regarding student religious speech despite the Eleventh Circuit's citation/reliance on *Muller* in *Denno*. The Eleventh Circuit cites neither *Muller* nor *West* in its *Chandler* opinion although it casts *Chandler*, in large part, as a free speech case.

4. Procedurally
a. Reversal of student prayer portion of injunction remains in effect
b. Eleventh Circuit's first *Chandler* decision reinstated, reaffirmed

V. Conclusion

A. Convergence of three trends in contemporary constitutional jurisprudence: neutrality principle in Establishment Clause jurisprudence, eliding of Establishment Clause and Free Speech analyses, especially when Free Speech is combined with Free Exercise Clause arguments, and diminution of students' constitutional rights generally.

B. "The 'free exercise' and 'free speech' rights of students do not trump the Plaintiffs' rights to be free of Establishment Clause violations."[100]

C. Judge De Ment in denying the state's motion to stay his October 1997 injunction noted that the state's Attorney General's perception of "an undue burden on free expression rights. . . and public interest factors" would preserve "the status quo" and the imposition of "majoritarian will," and, in the case of *Chandler*, majoritarian views and majoritarian religion.[101]

D. When the courts command that religious speech be not proselytizing, is that not the government dictating the content of the people's prayers?[102]

E. When school officials privilege certain types of speech, approved of the majority, by exempting them from suppression or supervision, are they not "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion"?[103]

Notes

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1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969); See also *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 681 (1995) ("students do not 'shed their constitutional rights ... at the schoolhouse gate'"), *Hazelwood Sch. Dist. v. Kulhmeier*, 484 U.S. 260, 266 (1988) ("students in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"), *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) ("This Court acknowledged in *Tinker v. Des Moines Independent Community School Dist.*, . . . that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"), *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (In an often quoted statement, [this] Court said that students do not 'shed their constitutional rights ... at the schoolhouse gate.'"). It is interesting to note that of the ten United States Supreme Court opinions in which this language appears, six are public school cases (*Tinker*, *Kulhmeier*, *Fraser*, *Pico*, *T.L.O.*, and *Acton*) and three of those six restricted students' constitutional rights. Moreover, the statement does not appear in the Courts 2002 *Earls* decision (*Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 2559 (2002) random urinalysis drug testing of students participating in extracurricular activities did not violate the Fourth Amendment) although the Tenth Circuit, striking down the random drug testing policy quotes *Tinker* in its *Earls* opinion (*Earls v. Board of Educ. of Tecumseh Public Sch. Dist.*, 242 F.3d 1264, 1275 (10th Cir. 2001) ("It is well established that. . . students do not "shed their constitutional rights ... at the schoolhouse gate'").

2. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986).

3. *Hazelwood Sch. Dist. v. Kulhmeier*, 484 U.S. 260, 266 (1988) ("We have nonetheless recognized that the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings'"), *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

4. *Tinker* at 503.

5. *Fraser* at 680.

6. *Kulhmeier* at 260.

7. *Chandler v McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992).

8 *Id.* at 527

9. *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir.1993)

10. *Id.* at 1296.

11. *Id.* at 1296.

12. *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. of the Westside Cmty. Sch. Dist. v. Mergens*, 496 U.S. 226 (1990).

13. *Hedges* at 1300, citing *Lambs' Chapel v. Center Moriches Union Free Sch. Dist.* 508 U.S. 384, 390-94 (1993).

14. *Hedges* at 1300, citing *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 692-704 (1992).

15. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986); *Cohen v. California*, 403 U.S. 15 (1971).

16. *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir.1996).

17. *Id.* at 1535, citing *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion); *Muller* at 1538, quoting *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995).

18. *Muller* at 1536-1537, citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

19. *Muller* at 1539, citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683-85 (1986).

20. *Muller* at 1537, quoting *Hazelwood Sch. Dist. v. Kulhmeier*, 484 U.S. 260, 266 (1988).

21. *Muller* at 1537, quoting *Kulhmeier* at 267, citing *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 n.7 & 47.

22. *Muller* at 1538, quoting *Kulhmeier* at 267.

23. *Muller* at 1538.

24. *Id.* at 1538.

25. *Id.* at 1539, quoting *Cohen v. California,* 403 U.S. 15, 25 (1971); *Muller* at 1539, quoting *Veronia Sch. Dist. 47J v. Acton* 515 U.S. 646, 655, 656 (1995). Here, the Muller court ignores the fact that under *Fraser* schools have authority to ban *Cohen*-type speech.

26. *Muller* at 1540.

27. *Id.* at 1540.

28. *Id.* at 1541.

29. *Id.* at 1542, quoting *Hazelwood Sch. Dist. v. Kulhmeier*, 484 U.S. 260, 266 (1988); *Muller* at 1542.

30. *Id.* at 1542.

31. *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), *aff'd on r'hrg sub nom., Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000); *Denno v. School Bd. of Volusia County*, 218 F.3d 1267 (11th Cir. 2000).

32. *West v. Derby Unified Sch. Dist. # 260*, 206 F.3d 1358 (10th Cir. 2000) (*West I*).

33. *West I* at 1225-31; *West v. Derby Unified Sch. Dist. # 260*, 206 F.3d 1358, 1362-63 (10th Cir. 2000) (*West II*).

34. *West II* at 1361, quoting Racial Harassment or Intimidation [Policy], 1995, n.p.

35. *West I* at 1225-31. *West II* at 1362.

36. *West I* at 1225-31; *West II* at 1363.

37. *West II* at 1361.

38. *West II* at 1366, quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505, 509 (1969).

39. *West II* at 1366.

40. *West I* at 1231.

41. The district court noted that even under *Tinker*, schools could ban speech if it threatened a material and substantial disruption of school discipline. *West I* at 1232, citing *Tinker* at 508.

42. *West I* at 1233.

43. *West II* at 1368.

44. *West I* at 1236.

45. *Denno v. School Board of Volusia County,* 218 F.3d 1267 (11th Cir. 2000).

46. *Id.* at 1271, citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

47. *Denno* at 1272, quoting *Tinker* at 683. This begs the question of defining "civilized."

48. *Denno* at 1273.

49. *Id.* at 1273 n.4, quoting *West v. Derby Unified Sch. Dist. No. 260,* 206 F.3d 1358, 1366 (10th Cir.2000).

50. *Denno* at 1273.

51. *Id.* at 1272, quoting, *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995); *Denno* at 1272, citing *Fraser* at 681.

52 *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000).

53 *Id.* at 1092, 1097.

54 *Id.* at 1097.

55 It is very interesting that these "Christian" students attempted to deliver their speeches as written and stated "if anyone was offended they could leave the graduation." *Id.* at 1098.

56 *Id.* at 1101.

57 *Saxe v State College Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001).

58 *Id.* at 203.

59 *Id.* at 203.

60 *Id.* at 205.

61 *Id.* at 205.

62 *Id.* at 207.

63 *Id.* at 210.

64 *Id.* at 211.

65 *Id.* at 211.

66 *Id.* at 211.

67 *Id.* at 215.

68 *Id.* at 217, 218.

69 *Castorina v Madison County Sch. Bd.*, 246 F.3d 539 (6th Cir. 2001).

70 *Id.* at 539.

71 *Id.* at 540.

72 *Id.* at 540

73. *Chandler v. James*, 958 F. Supp. 1550 (M.D. Ala. 1997) (*Chandler I*). Decided Mar. 12, 1997.

74. *See Jaffree v. Wallace,* 705 F.2d 1526, 1535-36 (11th Cir.1983), *aff'd,* 472 U.S. 38 (1985); *Jaffree v. Wallace,* 705 F.2d 1526, 1535-36 (11th Cir.1983), *aff'd,* 466 U.S. 924 (1984).

75. *Chandler I* at 1553, quoting Ala. Code § 16-1-20.3(b) (1995).

76. *Chandler v. James*, 985 F. Supp. 1062 (M.D. Ala. 1997) (*Chandler II*). Decided Oct. 29, 1997.

77. *Id.* at 1063

78. *Id.* at 1065-66.

79. *Id.* at 1063.

80. *Id.* at 1063.

81. *Chandler v. James*, 985 F. Supp. 1068 (M..D. Ala. 1997) (*Chandler III*). Decided Nov. 12, 1997.

82. *Chandler v. James*, 985 F. Supp. 1094 (M..D. Ala. 1997) (*Chandler IV*). Decided Nov. 12, 1997.

83. *Chandler IV* at 1099-1100.

84. *Chandler v. James*, 998 F. Supp. 1255 (M..D. Ala. 1997) (*Chandler V*). Decided Dec. 17, 1997.

85. *Chandler V* at 1272.

86. *Id.* at 1272.

87. *Id.* at 1272.

88. *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) (*Chandler VI*).

89. *Chandler VI* at 1254.

90. *Chandler VI* at 1262; *Chandler VI* at 1262 n.12.

91. *Chandler VI* at 1262.

92. *Chandler VI* at 1260.

93. *Chandler VI* at 1262 n.11.

94. *Chandler VI* at 1261.

95. *Chandler v. Siegelman,* 530 U.S. 1256 (2000).

96. *Doe v. Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000).

97. *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000).

98. *Doe v. Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000).

99. *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000).

100. *Chandler v. James*, 998 F. Supp. 1255, 1272.(M..D. Ala. 1997).

101. *Id.* at 1255, 1264.

102. *Engel v. Vitale*, 370 U.S. 421 (1962).

103. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

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